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J. Owen Saunders

TRADE AGREEMENTS AND ENVIRONMENTAL SOVEREIGNTY: CASE STUDIES FROM CANADA

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I. INTRODUCTION

Attitudes towards free trade, whether in the context of the General Agreement on Tariffs and Trade[1] or the North American Free Trade Agreement,[2] typically reflect both concerns over threats to vulnerable domestic industries and the attraction of expanded export markets. It is the tension between these two forces that generates the ultimate compromise of trade policy. Similarly, with respect to environmental policy, the possibility of international agreements and international sanctions raise both the prospect of benefitting from wider application of internationally beneficial environmental standards and the spectre that domestic autonomy in environmental policy will be eroded. Given that modern international trade agreements such as NAFTA and, to a lesser extent, the Uruguay Round of GATT,[3] inevitably carry with them important environmental implications, it is not surprising that these agreements have attracted the attention of the environmental community. It is probably inevitable that those environmentalists concerned with restrictions on domestic environmental autonomy should find common interests with those voices representing industries threatened by competition from imports. The challenge in such situations is often to distinguish between what is a legitimate environmental measure and what is protectionism in green clothing.

* Executive Director, Canadian Institute of Resources Law, and *Adjunct Professor, Faculty of Law, The University of Calgary, Calgary, Alberta, Canada T2N 1N4.

1. General Agreement on Tariffs and Trade (GATT), 61 Stat. A3, 55 U.N.T.S. 187 (1947).

2. North American Free Trade Agreement (NAFTA), Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 605 (1993) (*entered into force* Jan. 1, 1994).

3. General Agreement on Tariffs and Trade, the Uruguay Round, 33 I.L.M. 1 (1994).

This paper examines the tensions between international disciplines and national autonomy in the context of two issues that have been highly visible in Canada. These issues are the exploitation of Canada's forests, and the possibility of large-scale exports of Canada's fresh water. This paper considers each of these issues in turn. First, however, it is necessary to provide a brief overview of Canadian perspectives on free trade, with special reference to the natural resources sector.

II. BACKGROUND

In analyzing Canadian perspectives on the relationship between international trade agreements and environmental sovereignty, it is crucial to have an understanding of the historical context of Canadian policies on natural resource exploitation, since in many respects, issues of natural resource management drive Canadian environmental policy—and certainly more so than in the United States. For most of Canada's history as a distinct country there has existed as an important part of its culture a stream of nationalist sentiment which has had as one of its central foci the role of natural resources in economic development. This sentiment has been reflected from time to time in governmental measures directed at encouraging the further processing of these resources in an attempt to capture what would be referred to today as "forward linkages." The underlying fear that has spawned such measures is that Canada will serve merely—and to its detriment—as a "hewer of wood and drawer of water" for the countries that have dominated its trade relations, which, roughly speaking, are the United Kingdom before World War II and the United States since the War. In this respect, many Californians will detect a current that is not dissimilar to forces historically at play in Mexican political culture and which have been extremely influential in Mexico-U.S. relations, particularly in the energy sector.[4]

The influence of this nationalist stream of thought has ebbed and flowed over the years, but was in full flood from the mid-1960s until the early 1980s under a series of liberal gov-

4. For a discussion of the similarity between Canadian and Mexican political experience in this respect, see J. Owen Saunders, *The Mexico Factor in North American Free Trade: A Canadian Perspective,* 9(4) J.E.R.L. 239, 240-48 (1991).

ernments in Ottawa, reaching its highwater mark in the National Energy Program of 1980.[5] Interestingly, and not surprisingly given the nature of oil price increases in the 1970s, this period was also characterized by a similarly intense period of what might be called "resource nationalism" in Mexico.[6] Like Canada, Mexico introduced its own National Energy Program in 1980, albeit the concerns addressed in that policy were different from those which motivated Canada.[7] Indeed, the similarities in nationalist sentiment between Mexico and Canada over this period go beyond the energy sector to embrace a reevaluation of the general benefits of foreign investment.[8] In both cases, while the resulting laws and policies were generally directed at foreign investment, as a political reality, the driving force for these measures was specific concern with United States investment and economic hegemony.

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5. Energy, Mines and Resources Canada. *The National Energy Program* (1980). The Program was implemented by means of a number of federal acts. At the heart of the Program was the goal of achieving energy self-sufficiency for Canada, especially with respect to petroleum resources. This goal was combined with a policy of increasing the degree of Canadian ownership and control over the oil and gas sector, as well as a two-tier price system to soften the transition to higher world energy prices for Canadians. Because the Program was built on the assumption of continued and rapid increases in oil prices, such as those that characterized the 1970s, much of it was in effect rendered obsolete even by the early 1980s. The other key aspects of the Program were effectively gutted with the election of the Progressive Conservative government of Brian Mulroney in 1984.

6. Although in the case of Mexico the antecedents in the petroleum sector go back much further, to the nationalizations of the 1930s, and, for obvious historical reasons that need not be rehearsed here, they evoke much stronger feelings than has been true in Canada.

7. Mexico did not have the same concerns with respect to foreign control of its energy sector as did Canada. However, Mexico was interested in diversification of its energy markets to avoid undue dependence on United States customers. For a discussion of the Mexican National Energy Program, *see* G. Székely, *Dilemmas of Export Diversification in a Developing Economy: Mexican Oil in the 1980s,* 17(11) WORLD DEVELOPMENT 1777, 1780-82 (1989).

8. Thus, for example, one of the landmark steps in Canadian thinking during this period was a 1972 government-initiated report on foreign investment, known as the "Gray Report" after its chairman. H.E. Gray (Chairman), FOREIGN DIRECT INVESTMENT IN CANADA (1972). This was followed shortly by federal legislation that provided for both restrictions on and review of foreign direct investment in Canada. Foreign Investment Review Act, S.C. 1973-74, c.46, as amended. One of the most significant pieces of Mexican legislation restricting such investment is of the same vintage, that is the 1973 *Law to Promote Mexican Investment and Regulate Foreign Investment,* which reserved to either the Mexican government or Mexican nationals large sectors of the Mexican economy, especially with respect to natural resources.

The 1980s saw a retreat from the nationalist agenda in Canada, and in Mexico as well. In Canada, this retreat began even before the 1984 election of the Conservative government, but accelerated appreciably after that.[9] The culmination of the Mulroney government's efforts to open up the Canadian economy, especially vis-à-vis the United States, was of course the conclusion of the Canada-U.S. Free Trade Agreement,[10] despite the fact that the FTA had not even been mentioned as a Conservative Party objective in the 1984 election campaign.

Whether or not Canada should ratify the FTA became the central issue of the federal election campaign of 1988. Later, to a lesser extent, the alleged defects in NAFTA similarly became an issue in the federal election of 1993. The opposition to FTA was especially stiff and engaged a coalition comprised of groups such as labor unions, environmentalists, and nationalists, with some significant overlap among these constituencies. Although many issues were raised in the course of these debates, some of which will be more familiar to Americans in the context of NAFTA, none was more important than the implications of the Agreements on Canada's ability to manage its natural resources endowment—an issue that raised questions of fundamental importance with respect to environmental policy.

However, the Canadian approach to sovereignty and environmental policy was in many respects a schizophrenic one. On the one hand, there was a concern that free trade would lead to Canada losing control of its environmental policy, with the result that it would be forced to accept as the "lowest common denominator" the standards of those governments

9. The new openness to international economic influences was reflected most immediately in the repeal of investment review legislation and the replacement with legislation that had as its primary focus the encouragement of foreign investment in Canada. Apart from its new approach to foreign investment, the incoming federal government also acted to effectively reverse many of the nationalist elements in Canada's energy policy by deregulating prices and limiting the National Energy Board's regulatory role over natural gas exports.

10. Can.-U.S. Free Trade Agreement (FTA), Dec. 10, 1987 (*entered into force* Jan. 1, 1989) (Implemented in Canada by the Canada-United States Free Trade Agreement Implementation Act, S.C. ch. 65 (1988), and in the United States by the United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub.L. 100-449, 102 Stat. 26 (1988)).

willing to accept pollution as the price of investment.[11] On the other hand, there was a concern that other countries, especially the United States, might use inappropriately stiff environmental standards as a justification for engaging in protectionism of weak resource sectors. The discussion below provides two examples of such Canadian concerns. The long-running dispute with respect to Canadian exports of softwood lumber illustrates concern over the application of allegedly "inappropriate" United States natural resource management practices to justify protectionist measures against Canadian exports. The debate over possible water exports illustrates Canadian fears that international trade rules in FTA and NAFTA will act to constrain Canadian domestic autonomy in natural resources and environmental management.

III. SOFTWOOD LUMBER

Canadian concerns with natural resources protectionism in the United States grew out of a series of trade disputes in the 1980s. The case of softwood lumber is of special interest because disputes concerning Canadian lumber practices were a significant point of contention between Canada and the United States in the period leading up to the conclusion of the FTA.[12] Moreover, the central dispute concerned what most environmentalists would consider today to be an issue of environmental management, although it was not phrased in those terms at the time.

The softwood lumber dispute was one of a series of actions by United States trade tribunals that reflected what was generally perceived by Canada (and other trade partners) as a growing mood of protectionism on the part of the

11. This is a concern that is well-known in the United States and was the subject of much attention in the NAFTA debate. In the United States, however, the perceived potential polluter that threatened environmental standards was Mexico. In Canada, this threat in the context of the FTA was seen—rightly or wrongly—to stem from the United States, and particularly from southern states eager to attract investment.

12. Two disputes in particular attained national visibility in Canada. The first, and more serious, concerned a countervail action against Canadian softwood lumber. The second involved an "emergency" action against Canadian cedar shakes and shingles. In the interest of brevity, and because, strictly speaking, emergency actions do not go to the issue of "fair trade" practices, this article will deal only with the former. Both FTA and NAFTA, however, contain significant provisions designed to reduce the incidence and scope of emergency actions.

United States in the 1980s.[13] This protectionist trend found expression in both Congress and in the tribunals charged with administering United States trade law. More particularly with respect to natural resources, the trend reflected concerns on the part of United States resource producers that they were the victims of "unfair" competition by foreign competitors, including Canada.

In 1985, in the face of growing domestic political discontent with the administration of United States countervail law, the United States Court of International Trade [hereinafter "CIT"] changed course with respect to an important element of its test of what constitutes a countervailable subsidy. One of the basic questions in determining whether there has been improper subsidization of an imported good is whether that subsidy is specifically bestowed on an industry. It is accepted under international trade law that generally available subsidies which are not targeted at specific industries should not be the subject of countervailing duties.[14] There is, however, a distinction between subsidies that are generally available in theory and those which are generally available in practice. Until the mid-1980s, the practice of the United States International Trade Administration [hereinafter "ITA"] was to focus on whether, as a matter of law, subsidies were generally available, rather than asking whether in practice some industries received greater benefits from the subsidy than did others. This approach to specific endowment of subsidies was effectively rejected by the CIT in a 1985 case dealing with the consequences of Mexico's two-tier system of natural gas pricing,[15] a system that had striking parallels in the two-tier approach which had at one time operated in Can-

13. For a discussion of the history of natural resources protectionism in the United States, *see* Christian Yoder, *United States Countervailing Duty Law and Canadian Natural Resources: The Evolution of Resources Protectionism in the United States,* in TRADING CANADA'S NATURAL RESOURCES 81 (J. Owen Saunders, ed., 1987).

14. For example, Canada's national health care system clearly acts as a subsidy for employers in Canada, and indeed is often cited as giving them a measure of competitive advantage over United States competitors. It is not, however, a subsidy that would be actionable under international trade law since it is not bestowed on a particular industry. By comparison, if the health care system was restricted to workers in the mining sector, this would arguably constitute a benefit specifically bestowed on that industry, and, as such, be open to attack through countervailing duties.

15. Cabot Corp. v. United States, 620 F. Supp. 722 (1985).

ada. This paper will not discuss that decision in detail. The relevant point for this paper is that the change in approach had important implications in Canada with respect to the forest industry.

In 1983, in response to a petition against the Canadian softwood lumber industry by United States producers, the ITA determined that certain provincial forest management practices, most importantly the stumpage fees charged to the forest industry from Crown timber, amounted to subsidization.[16] However, the ITA had also decided that not only were the amounts involved not significant, but there was no specific bestowal of the benefits on a particular industry. Moreover, even in the event of specific bestowal, there was no preferentiality exhibited by the practices.

In light of the 1985 decision on Mexican natural gas, another petition was brought against Canadian softwood lumber producers in 1986 on essentially the same facts as the 1983 petition. In October of that year, the ITA, following the reasoning of the Mexican gas decision, issued a preliminary ruling in which it effectively reversed its 1983 decision as to both bestowal and preferentiality.[17] Before a final decision (scheduled for December 1986) was issued, Canada and the United States reached an agreement under which Canada imposed an export tax of fifteen percent, which was eventually rescinded, in place of the threatened countervailing duties by the United States.[18]

The agreement between the two governments was criticized, for quite different reasons, on both sides of the border. In some quarters in Canada it was seen as a capitulation to United States protectionism; in other quarters it was offered as further evidence of the need for a dispute resolution mechanism that would protect Canada against such perceived abuses of United States trade law in the future.[19] To the ex-

16. Final Negative Countervailing Duty Determinations; Certain Softwood Lumber Products from Canada, 48 Fed. Reg. 24,159 (1983).

17. Preliminary Affirmative Countervailing Duty Determination; Certain Softwood Lumber Products from Canada, 51 Fed. Reg. 37,453 (1986).

18. Canada-United States Memorandum of Understanding on Softwood Lumber, Dec. 30, 1986. The understanding is grandfathered in the FTA in Article 2009. FTA, *supra* note 10, at art. 2009.

19. This is especially the case since the approach taken by the Court of International Trade ultimately found its way into the Omnibus Trade and Competitiveness Act of 1988.

tent that it gave greater impetus to a Canada-U.S. free trade arrangement, then, the case is of some importance. Less often remarked upon, however, is another aspect of the case—the extent to which it may be seen as one of the first cases in the Canada-U.S. trade relationship that concerned essentially environmental, in the broad sense of the word, issues.

As noted, the Canadian government eventually rescinded the agreement to impose an export tax on the basis that Canadian resource management practices were in conformity with international trade law and did not operate to confer a subsidy (which rescission led to tribunal hearings under the FTA/NAFTA dispute resolution mechanism). The underlying disagreement as to what does and does not constitute a subsidy, however, was left unaddressed. This issue was of primary concern for Canadian negotiators in the FTA negotiations. However, the FTA ultimately delivered only a commitment to negotiate a common set of trade rules that would presumably eliminate such disputes in the future.[20] In this respect, the commitment in NAFTA is even weaker,[21] leaving open the question whether, for example, resource management practices which would be considered environmentally "unsound" in the United States are open to countervail on the basis that they constitute a subsidy. While the Subsidies Code of GATT provides some assistance in this respect, as do the provisions on sanitary and phytosanitary measures in both NAFTA and the Uruguay Round Agreement on the Application of Sanitary and Phytosanitary Measures, it is by no means comprehensive in the problems it addresses.

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20. Article 1906 of the FTA essentially provides a period of seven years, consisting of an initial five-year period and a two-year extension, for the parties to negotiate a common set of rules. FTA, *supra* note 10, art. 1906. Meanwhile, pursuant to Article 1902, parties are committed to not change their trade rules in a way that is inconsistent with "the object and purpose of [the] Agreement." FTA, *supra* note 10, at art. 1902. The author has argued elsewhere, that although agreement on a common set of trade rules was a high priority for Canada in the FTA negotiations, the ultimate provision is of questionable value given the limited recourse available to Canada (i.e. repudiation of the entire Agreement) in the event of failure to agree on such rules. J. Owen Saunders, *Energy, Natural Resources and the Canada-United States Free Trade Agreement*, J.E.R.L. 1 (1990).

21. In NAFTA there is merely an agreement to "consult" on the "potential" development of more effective trade rules. NAFTA, supra note 2, at art. 1907(2).

A final practical question alluded to above should be addressed. That is, how successful was the application of trade sanctions from an environmental perspective in the softwood lumber case? Two observations should be made in this regard. The first is that judged on the basis of its political effectiveness as a measure to challenge Canadian forestry practices, it is at least arguable that the countervail action in the United States had a perverse result. Because the action was perceived in Canada as naked protectionism, it generated considerable support among the public for the forest industry under attack. Indeed, the very question of whether Canadian stumpage fees were inappropriately low became almost entirely lost in the domestic debate. In this respect, then, the case acted in some measure to disarm the Canadian environmental constituency that had been raising serious concerns as to the terms on which provincial governments disposed of Crown timber.

As a second observation, international action at the grassroots consumer level is a much more effective example of challenging the environmental soundness of Canadian forest practices and as been generally perceived in Canada as predicated on genuine environmental concerns, however much one might agree or disagree with those concerns, rather than protectionist motives. Moreover, it is clear that such actions have had real effects, especially at the political level, in changing attitudes to forest management in Canada.

In summary, the dispute over softwood lumber suggests that the possibility of so-called "green protectionism" cannot be dismissed. Although the issues in this dispute have not been framed in environmental terms, and although environmental groups were not involved in bringing the trade actions in question, the arguments with respect to the "proper" prices for disposal of natural resources obviously touch on much broader issues of resource conservation and use, which extend beyond the forest sector. While the FTA/NAFTA dispute resolution mechanism has proved useful in resolving this dispute for Canada—United States timber interests have been far less satisfied—the underlying problems of what are acceptable environmental practices and what are unacceptable subsidies, as well as the question of whose standards should apply in determining environmental acceptability, have not

been resolved. The questions will inevitably arise again in other contexts.

The dispute also suggests a possible downside to environmentalists forming common cause with industry groups pursuing normal self-interest. By playing the trade card in concert with such groups, there is a real danger that the environmental dimensions of the problem will be lost in the inevitable backlash against protectionism. If one of the longer-term objectives of environmental groups is to educate the public and develop broad support for an environmental ethos, it is not clear that alliances of temporary convenience will always prove useful.

IV. WATER EXPORTS

If softwood lumber provides an example of Canadian fear of United States resource protectionism, and, by implication, of having Canada's exports hindered by the imposition of foreign—and inappropriate—environmental standards, then the issue of water exports illustrates the other side of the coin, that is, the fear that Canada itself will be rendered incapable of applying its *own* environmental standards to *prevent* the export of its natural resources. The issue of water exports is one which goes back over three decades in Canada, and has never failed to generate strong feelings. It has been pointed out that Canadians, perhaps not uniquely, have different reactions to the sale of water than they do to the sale of other natural resources. For example, a recent inquiry on federal water policy noted the role of water in Canada's own vision of itself. Stated briefly: "Canadians . . . tend to identify themselves as a land laced with water,"[22] an identification which pervades Canadian cultural images. Not surprisingly then, the possibility of engaging in long-term massive exports of water is one that inevitably touched a nationalist chord in Canada. The most recent example of this current of nationalist feeling is found in the debate over the FTA, although the same arguments were replayed in a more muted version during the debate over NAFTA.

To understand Canadian concerns with respect to water exports, it should be recalled that beginning in the 1960s, and

22. Canada, Inquiry on Federal Water Policy, FINAL REPORT: CURRENTS OF CHANGE 7 (1985).

reemerging from time to time over the years, there have been a number of massive water export proposals focused on turning northern Canadian rivers southward to service what was typically viewed as a thirsty American market that would ultimately require such resources as the price of economic expansion, particularly in the rapidly growing, but arid, southwest.

To indicate the scope of these projects, one need only note the two that received the greatest attention: the NAWAPA proposal and the GRAND Canal. Under the former, rivers in the Canadian northwest, now flowing into the Arctic Ocean, would be reversed and channelled southwards into the southwestern United States by means of flooding the Rocky Mountain trench. Under the latter, James Bay would be diked and turned over time into a giant freshwater reservoir to collect and "recycle" otherwise "wasted" water from northern Quebec Rivers, with the waters shipped southwards through a series of canals and existing river systems in the Great Lakes and Mississippi system. It might be noted that this proposal also anticipated the use of large nuclear pumping stations to this end.

While these schemes might seem so environmentally objectionable (if not outrageous) that they could never be taken seriously, a number of factors gave such proposals heightened attention during the FTA debate. First, in the period leading up to the FTA negotiations, there was a revived interest in the GRAND Canal scheme. Indeed, at one point in an interview with FORTUNE magazine, Prime Minister Mulroney remarked in passing on the possible merits of such a project. Perhaps even more important, the chief Canadian negotiator for the FTA, before his appointment to the position, acted as a lobbyist for the GRAND Canal consortium and had written favorably on how Canada might use the attraction of water exports to negotiate a free trade arrangement with the United States. Another factor which gave the water export controversy special relevance in the context of the debate over the FTA was the coincidental emergence of a drought in 1988 in the Mississippi basin amid warnings that this was more generally indicative of a trend towards global warming and climate change. It was during this same period that there were proposals, which were ultimately rejected, to increase the allowed size of the Chicago diversion into the Mis-

sissippi system, a diversion which could be characterized in Canada as an indirect—and involuntary—form of water export.[23]

There were several aspects to the debate over the implications of FTA, and subsequently NAFTA, for Canada's ability to manage its water resources.[24] The most basic question was whether water in its "natural" state, that is, water that had not been "captured" in bottles or tankers,[25] was even included as a good under the FTA. It was the position of the Canadian government that water was not so included, while opponents to the Agreement insisted that the FTA was, at best, unclear in this respect and therefore should be amended accordingly. Assuming there was indeed room for an interpretation that included all fresh water within the purview of the Agreement, this would also hold true with respect to Canada's obligations under GATT. In the case of GATT, however, there were instruments available to effectively prevent such exports—for example, the possibility of prohibitive export taxes, which would be allowed under the GATT, but which are prohibited under FTA and under NAFTA.[26]

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23. The Chicago diversion dates to 1848, although the size of the diversion has varied. It became a significant flow in 1900 with the completion of the Chicago Sanitary and Ship Canal. The diversion draws water from Lake Michigan, and certain waters that would otherwise have flowed into the lake are diverted southwards. Although Lake Michigan lies wholly within the United States, a change in the lake's level would ultimately have an effect on all the Great Lakes.

24. For a full discussion of the trade implications of both the GATT and the FTA for Canadian water exports, *see* CANADIAN WATER EXPORTS AND FREE TRADE, Rawson Academy Occasional Paper No. 2 (A.L.C. de Mestral & D.M. Leith eds., Dec. 1989).

25. While it was generally conceded by all sides that bottled water or tanker exports of water came within the ambit of FTA and NAFTA, there is nevertheless room for doubt as to the restraints on provincial governments in their regulation of such exports as the result of the passage of FTA and NAFTA. For a discussion of the legal issues surrounding tanker exports which, for example, have been proposed between British Columbia and California in recent years see J. Owen Saunders, *Tanker Sales with the Support of a Province,* in CANADIAN WATER EXPORTS AND FREE TRADE, *supra* note 24, at 59.

26. Other issues in the debate included the possible application of the nullification and impairment provisions of the FTA, the proper interpretation of the national treatment clause with respect to water exports, and the scope of the "environmental" exceptions in GATT (which are also incorporated into FTA and NAFTA). A debate on these and other points between proponents and opponents of the Agreement is found in CANADIAN WATER EXPORTS AND FREE TRADE, *supra* note 24.

Even following the reelection of the Mulroney government in 1988 and the subsequent implementation of FTA, its possible threat to Canadian sovereignty over water exports continued to fester, and reemerged as an issue in the debate over NAFTA. One of the campaign planks of the opposition Liberals in the federal election campaign of 1993 was a commitment to achieve certain changes in NAFTA as a precondition to its implementation. One of the changes demanded was an alteration in NAFTA to make it clear that water in its natural state would not be subject to the provisions of NAFTA. Upon their election in the fall of 1993, the victorious Liberal Party made what many believed were token gestures in the direction of "improving" or "clarifying" NAFTA, although there was no change in the Agreement itself. One result was the issuance of a number of joint statements by the NAFTA parties, which were used by the new Canadian government as evidence that it had indeed met its election commitments. The statements included a joint statement "in order to correct false interpretations" that "[t]he NAFTA creates no rights to the natural water resources of any Party to the Agreement."[27] The statement is perhaps somewhat ironic since presumably the primary source of the "false interpretations" had been the Liberal Party itself, which had argued, beginning in 1988, that FTA and NAFTA were indeed open to this very reading.

One could construct arguments that even the joint declaration does not definitively close the case on water exports. However, this seems somewhat of a barren exercise, especially given the highly remote possibility that such megaprojects as NAWAPA or the GRAND Canal will be undertaken, if only because of economic realities—let alone because of their environmental implications.

The debate over water exports points out the degree of suspicion with which many environmental groups view international trade agreements. Although the example is in many ways a uniquely Canadian one in its specifics, it is clear from the debate in the United States over both NAFTA and the Uruguay Round of GATT that the qualms it reflects are more general. Perhaps less obviously than the softwood lumber dispute, however, it also illustrates how environmental is-

27. Statement by the Governments of Canada, Mexico and the United States, Dec. 1, 1993.

sues, once raised, tend to be given shorter shrift than other more parochial concerns. One reaction to the debate over water exports and the FTA, for example, was legislation at a provincial level designed to deal with the possible inequities of engaging in environmentally-disastrous transboundary diversions for export. For example, Ontario's Water Transfer Control Act, 1989 requires approval of the Minister of Natural Resources for the transfer of water out of any provincial drainage basin. However, transfers of water to "a place outside of Canada" are absolutely prohibited.[28] Presumably, if interbasin transfers are environmentally inappropriate, it should make no difference whether the transfer is within or outside Canada; from an environmental perspective both are equally bad. Indeed, the Act leaves open the possibility that an environmentally questionable diversion within Canada might be approved, while a more benign diversion to the United States would be rejected. One can understand the nationalist appeal of such a provision, but it can hardly be characterized as environmentally motivated at heart, no matter how much environmental rhetoric surrounds the provision.

V. CONCLUSION

The Canada-U.S. dispute over softwood lumber and the debate within Canada over the implications of free trade for water exports are only two examples of environmental issues becoming intermingled with issues of trade policy. Other examples exist and will continue to emerge. For example, the question of environmental sovereignty has arisen in the fisheries sector, where both the United States (for lobsters) and Canada (for herring and salmon) have arguably used nominally conservationist measures to protect segments of their domestic industries; these measures have led to dispute resolution under both GATT and FTA. Neither the new GATT agreement nor NAFTA have resolved the underlying disagreements that give rise to such disputes. There will inevitably be pressures on governments to play the environmental

28. Water Transfer Control Act 1989, S.O. § 6(2) (1989). This section expressly provides so, despite the conclusion of the FTA. Similarly, a proposed federal statute that died on the order paper with the calling of the 1988 federal election would have essentially prohibited new large interbasin diversions out of Canada. Bill C-156, Canada Water Preservation Act, 2nd Sess., 33d Parl., 1986-87-88 (1st Reading, August 25, 1988).

card in trade disputes, and those pressures will come from both interested industries and environmental groups. There will be strong temptations for environmentalists to make common cause with those who have other interests in the application of trade sanctions. It remains to be seen, however, whether short-term expediency will justify the long-term consequences of such alliances.